Supreme Court, U.S.
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No. 92-1376

In The

Supreme Court of the United States

October Term, 1992

NICKERSON AMERICAN PLANT BREEDERS, INC.,

Petitioner,

v.

LATHAM SEED COMPANY, ET AL,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March 15, 1993

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QUESTIONS PRESENTED

1. Because this case was reviewed under the *Haslip* standards, no question is presented regarding whether lesser standards would comply with due process.

2. Because the jury considered only evidence of wrongful conduct which was relevant to NAPB's fraud and malice, NAPB's second question lacks record support and has no merit.

3. Because the instructions limited the jury to consideration of the financial condition of NAPB in awarding punitive damages, NAPB's question alleging the instructions allowed the wealth of third parties to be considered is unfounded.

4. Because the punitive damage awards were proportional to the wrongful conduct and resulting harm, no due process issue is raised by the size of the punitive damage awards, and the fourth question has no merit.

RULE 29.1 STATEMENT

Latham Seed Company, located in Alexander, Iowa, is an Iowa corporation with no parent or subsidiary corporations.

The Ohio Grain Company, f/d/b/a Ohio Soil Service, Inc., located in Marysville, Ohio, is an Ohio corporation with no parent or subsidiary corporations.

Schettler Seed Farm, Inc., d/b/a Diamond Brand Seeds, located in Carroll, Iowa, is an Iowa corporation with no parent or subsidiary corporations.

Rupp Seeds, Inc., located in Wauseon, Ohio, is an Ohio corporation with no parent or subsidiary corporations.

Shockney Seed Service, Inc., located in Farmland, Indiana, is an Indiana corporation with no parent or subsidiary corporations.

Diener Bros., Inc., located in Reynolds, Indiana, is an Indiana corporation with no parent or subsidiary corporations.

Charles O. Laverty, d/b/a Laverty Seed Farm, located in Indianola, Iowa, is a proprietorship solely owned by Charles O. Laverty.

St. Joseph Valley Seed Co., d/b/a M.F.I. Seeds, located in Mendon, Michigan, is a Michigan corporation, and is a wholly owned subsidiary of Northern Star Companies, Inc., a Michigan corporation.

RULE 29.1 STATEMENT – Continued

Coomer Seeds, Inc., located in Woodburn, Indiana, is an Indiana corporation with no parent or subsidiary corporations.

Settlemyre Seed Company, located in Clarksville, Ohio, is an Ohio corporation with no parent or subsidiary corporations.

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INTRODUCTION

The Eighth Circuit Court of Appeals in this case fully implemented this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991). Petitioner, Nickerson American Plant Breeders, Inc. (NAPB), has misrepresented the record by claiming otherwise. Because submission and review in this case wholly conformed with *Haslip*, the Petition for Certiorari should be denied without further delay.

The instructions to the jury limited the jury's discretion to award punitive damages and protected the Defendant's right to due process under reasonable constraints consistent with *Haslip*.

The punitive damages awarded in this case have been scrutinized and approved by the courts five times. In its Ruling on Post-Trial Motions, the district court reviewed the award under the relevant case law from each jurisdiction involved as well as the Eighth Circuit. In addressing the due process challenge, the court "actively reviewed the jury's award to insure that it is not so excessive as to violate due process or establish undue prejudice." Pet. App. 33-34A[1] (The 1st review). NAPB's appeal was argued and submitted to the Eighth Circuit after *Haslip* was decided by this court. (The 2d review). The Eighth Circuit remanded the case to the district court to perform a searching review of the jury's award, fully consistent with the *Haslip* decision.[2] SA 1-3. The district

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[1] Citations to the Appendix to the petition will be styled "Pet. App. ___A." Citations to the attached Supplemental Appendix will be styled "SA___." Citations to the Joint Appendix in the court of appeals will be styled "JA___." Citations to the transcript will be styled "Tr. ___."

[2] The Eighth Circuit has applied the same procedure in all appeals that were pending when *Haslip* was decided. Beginning with *Robertson Oil Company, Inc. v. Phillips Petroleum Company*, 930 F.2d 1342 (8th Cir. 1991), cases were remanded to enable the

court conducted a careful analysis of evidence which supported the punitive damage award under the standards approved in *Haslip* as well as relevant state case law and made detailed written factual findings which supported the award. Pet. App. 36A-51A. (The 3rd review). The Eighth Circuit then, upon the appeal, scrutinized the record under both the *Haslip*-approved standards and state law standards and found the award to be consistent with due process under both standards. Pet. App. 1A-19A (The 4th review). NAPB petitioned for rehearing with suggestion for rehearing *en banc* and urged the grounds now raised in this Petition. The Eighth Circuit declined to rehear the case. Pet. App. 52A (The 5th review). NAPB's right to due process has been fully protected, and no due process violation occurred.

This case does not present the due process issues on which review was granted in *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W.Va.), *cert. granted*, 113 S.Ct. 594 (November 30, 1992) (No. 92-479). The West Virginia court refused to apply the *Haslip* factors in *TXO*. In contrast, NAPB has had the benefit in this case of the full panoply of procedural protections approved by this Court in *Haslip*. The instruction to this jury imposed a reasonable constraint on jury discretion to award punitive damages, like the instruction approved in *Haslip*. Review of the verdict has been given in accordance with the standard approved in *Haslip*, and the reviewing courts have determined that the punitive

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district court to review punitive damage awards under the standards approved in *Haslip*. *Cole v. Control Data Corporation*, 947 F.2d 313 (8th Cir. 1991); *Doe v. B.P.S. Guard Services, Inc.*, 945 F.2d. 1422 (8th Cir. 1991); *Union National Bank of Little Rock v. Mosbacher*, 933 F.2d 1440 (8th Cir. 1991). All of the Eighth Circuit's decisions since *Haslip* have reviewed the three levels of due process protection which this Court found to comply with due process in *Haslip*. The Eighth Circuit reversed the award of punitive damages in *Glover v. McDonnell Douglas Corp.*, 981 F.2d 388 (8th Cir. 1993).

damage award is not out of proportion to the severity of the wrongful conduct.

The issues raised in *TXO* are distinguishable and will not affect this case because:

1. These jury instructions clearly defined proper purposes for punitive damages and imposed definite and meaningful constraints upon the award of punitive damages;
2. These jury instructions did not permit the consideration of the financial condition or wealth of any party other than NAPB;
3. These jury instructions required proof of legal malice as a condition to the award of punitive damages;
4. These jury instructions required proof of entitlement to punitive damages by clear, convincing and satisfactory evidence for six of the Plaintiffs;
5. More than $1 million compensation for out-of-pocket loss was awarded for fraud;
6. Liability was imposed for common-law fraud, long a part of the law in all states involved;
7. All evidence of NAPB's wrongful conduct involved wrongful acts committed directly against the Plaintiffs;
8. The district court made an independent, on-the-record determination that there was a *prima facie* case for punitive damages before permitting Plaintiffs to comment on the financial condition of NAPB;
9. The district court conducted a searching post-trial review of the punitive damages under the *Haslip* standards, permitting the parties to fully brief and argue their positions and to file supplemental briefs and then made detailed, written findings of the facts supporting the award and the court's reasons for approving the award;

10. The Eighth Circuit permitted the parties to submit additional briefs and written arguments, conducted a full review under *Haslip*, undertook a thorough re-examination of the facts and rulings below and issued a decision that fully explained the reasons for the affirmance of the punitive damages; and
11. Not a single judge of the Eighth Circuit supported NAPB's petition for rehearing with suggestion for rehearing *en banc* which raised the same issues presented in NAPB's Petition for Writ of Certiorari.

There is no reason to delay the denial of certiorari in this case until *TXO* is decided. This case will not be affected by what is decided in *TXO*. Only a reversal of *Haslip* would warrant further proceedings in this case. Delay will only aggravate the injury NAPB has already inflicted.

This Court's ruling in *Haslip* has controlled this case. *Haslip* was carefully and meticulously followed. Liability for fraud was decided in accordance with the long-standing principles of the common law of Iowa, Indiana, Michigan and Ohio. No federal claims are involved. There is no conflict among the circuits. The circuit courts of appeal have uniformly ruled that the procedures followed in this case afford a defendant due process. Those standards are clearly articulated by this Court in *Haslip*. Because the only question presented in this record is whether this Court would reach the same result as the district court and Eighth Circuit in a similar application of the *Haslip* standards to the facts here, the questions raised in NAPB's Petition have no precedential implications. No reason exists for delaying further the implementation of the judgment in this case.

STATEMENT

NAPB's lack of candor with this Court in its Petition for a Writ of Certiorari echoes its lack of candor with the

Plaintiffs in 1983 and 1984. NAPB has turned the record inside out and upside down in its effort to mislead this Court into thinking that a question for review exists. It classifies this case as "relatively minor commercial disputes" (Pet. 3); however, the jury awarded the Plaintiffs more than $1 million dollars in out-of-pocket loss damages for NAPB's fraud. NAPB minimizes its fraud by asserting that its fraudulent concealment lasted only from March to July 1984 (Pet. 4, 8); however, the jury could find that the fraudulent concealment lasted from April 11, 1983 to July 1984. Pet. App. 28A, 44A. NAPB asserts that the jury instructions allowed the jury to award punitive damages based upon the wealth of Royal Dutch/Shell (Pet. Question 3); however, the jury instructions show this assertion is untrue. SA 11. NAPB avers that the post-verdict review was not under the standards of procedural due process approved in *Haslip* (Pet. Question 1); however, this is also untrue in view of the probing review of the jury award under the *Haslip* standards by the district court and the Eighth Circuit. Pet. App. 1A-19A, 36A-51A. Similar misrepresentations led the district court to criticize NAPB when ruling on post-trial motions: " . . . [D]efendant presents the evidence in the light most favorable to it, rather than in the light most favorable to the jury's verdict." Pet. App. 28A. NAPB's misrepresentation of the record on appeal led the Eighth Circuit to comment: "Nickerson mistakenly seizes upon various fragments in the district court's opinion and asserts that the district court applied an overly malleable standard to satisfy the requirements of due process." Pet. App. 17A.

This case involved contract and fraud claims by ten family-owned soybean seed companies, referred to as Agripro Associates, against NAPB. The ten Associates marketed soybean seed through their own dealer organizations in the states of Iowa, Illinois, Indiana, Minnesota, Nebraska, South Dakota, Kansas, Missouri, Michigan, Ohio, and Kentucky.

The Agripro brand name and the Agripro Associate method of marketing soybean seed were developed in 1973. Agripro, Inc. did the research and development of foundation soybean seed which they sold to the Agripro Associates. Every spring the Associates purchased and planted foundation seed, harvested the resulting soybean crop in the fall, and cleaned and conditioned the seed in the Associates' own seed plants during the winter. Thus, the Associates turned the foundation seed into commercial soybean seed which the Associates sold to farmers through their own dealer organizations.

NAPB, a partnership owned equally by the Royal Dutch/Shell Companies and Olin Corporation, purchased Agripro, Inc. in 1976. Before the purchase was finalized NAPB established a relationship of trust and confidence with each Associate. NAPB recognized that the Associates and their farmer dealer organization were responsible for the excellent reputation of Agripro soybean seed. NAPB described its relationship with the Associates as "partners," a "working marriage" and "family." It assured the Associates that there would be no change in the Associate system.

NAPB prepared and distributed to the Associates written Agripro Associate Policies. These policies provided in part that: "NAPB will keep the Agripro Associates informed on all matters relevant to the Associate program . . . " Exhibit 32 JA 301. The policies also assured the Associates that all information furnished NAPB would be kept in the strictest confidence.

From July of 1976 through June of 1984, NAPB continually reaffirmed its agreement and represented that (1) the Associates would be kept informed of all matters that affected their relationship with NAPB and that (2) Agripro soybean seed would be marketed exclusively by the Associates, not by NAPB or its dealers.

Warren Melles became president of NAPB in early 1983. Prior to Melles' employment there was no consideration given to terminating the Agripro Associate program. However, on April 11, 1983, NAPB's board of

directors secretly decided to terminate the Associates and to aggressively sell Agripro soybean seed through its own direct dealers and through dealers they planned to steal from the Associates. Exhibit 67 JA 497-498. NAPB launched a clandestine scheme to acquire the Associates' sales of Agripro soybeans and to steal their dealer force. By eliminating the Associates, NAPB could increase its share of the profits from Agripro soybean sales by an estimated $10 million and take over the Associates' 4,000 dealers.

John Parke, a consultant, was hired by NAPB to orchestrate the scheme. He visited the Associates in order to acquire information on their operations. In a written report, Parke bragged to NAPB President Melles about the "cover story" he used to conceal his true purpose. The Associates gave Parke complete access to confidential business information as they had no inkling the information was going to be used by NAPB to compete against them.

Parke met secretly with key NAPB officials under the code names "Brand Positioning" and "Parke Project." During the meetings, NAPB managerial employees advised Bruce Rydeen, NAPB's director of marketing, that there had been prior promises made to the Associates regarding their exclusive right to market Agripro soybeans. Verle Wathen, NAPB's regional sales manager, questioned whether competing with and then terminating the Associates was right. He repeatedly pointed out the promises that NAPB's presidents had made. Others voiced adamant concern. Members of the committee questioned whether discontinuing the Associate system was legal. Committee members argued that the decision wasn't morally or ethically right. One NAPB official wrote to President Melles that his biggest concern for 1984 was "legal implications of cutting off the Associates and *stealing* their dealer force." Exhibit 72, JA 564, 573. [Emphasis added.]

At a December 1983 Parke Committee meeting, the Associates' dealer names were a major topic. Verle Wathen reported how "touchy" the Associates were about the identity of their dealers. NAPB asked Chuck Stephens, its advertising manager, to check Associate Schettler's dealer list. Stephens didn't think this was an ethical thing to do. NAPB tried to get the dealer names by offering to help boost Associate sales through identifying their key dealers. Charlie Jackson testified at trial how he lied to obtain dealer names.

Risks of the strategy were assessed in January of 1984. NAPB identified two risks in a written memorandum: (1) There will be litigation and (2) "How big is the dollar risk? How deep is Shell's pocket?" Exhibit 1068, JA 582.

Wathen told Russ Welty, an NAPB employee, to obtain "discreetly" a list of Associates' dealers. Welty was proud that he had gained the trust and confidence of the Associates, but now he was being asked to betray the Associates. Believing he was being directed to be dishonest, he refused the assignment and was fired.

On April 10, 1984, one year after the initiation of its clandestine scheme, NAPB signed a contract with Jim Coomer to *become* an Associate. NAPB had directed that there be no leaks regarding the termination of the Associate program. In signing the contract with Coomer, NAPB's national sales manager Thompson said he "bastardized" himself and knew the company misled Coomer in signing the contract. Thompson had discussed the Coomer contract with NAPB's legal counsel and corporate officers beforehand.

During the scheme, NAPB continued to say that only Associates would sell Agripro soybeans. NAPB wrote to all the Associates in November 1983 stating that only the listed Associates could produce and market Agripro soybean varieties. NAPB's corporate attorney wrote to Latham's attorney in February of 1984 stating, "Allow me to reinforce the fact that only Agripro Associates . . . are

legally empowered to offer for sale or sell Agripro products." NAPB continued to assure Associates that they would be kept currently informed on all matters. Melles told Latham in December of 1983, "If, in fact, we make a significant change, I will tell you personally when the time is right." Melles conceded, however, he did not tell Latham about the study that had been undertaken regarding brand positioning. Nor did he tell Latham about the secret decision to eliminate the Associates.

NAPB had numerous opportunities to disclose its change in policies and its decision to terminate and compete with the Associates. Melles and other NAPB officials met with the Associates in June 1983 to discuss objectives and challenges for NAPB, but the planned elimination of the Associate program was not discussed. NAPB took Associates to England in the summer of 1983 to visit Nickerson Seed Company, Shell's U.K. subsidiary; the Royal agricultural show; and Royal Dutch Shell's London headquarters. NAPB told the Associates how important they were to NAPB and to Shell. They were not told of NAPB's secret plan to terminate them and take over their dealers and sales of Agripro soybeans. NAPB held its Soybean Seed Sales Schools in September 1983. Again, NAPB did not disclose that it would be competing with the Associates for 1984 sales. In December of 1983, the Associates met in Chicago with Melles who led them to believe the Agripro Associate Program would continue without change. In the winter of 1983, NAPB's area sales representatives told Associate Ohio Grain it had nothing to worry about. In March, 1984, national sales manager Thompson told Ohio Grain that NAPB was committed to the Agripro program.

NAPB's plan was to keep the Associates in the dark: " . . . [W]e should only say what is absolutely necessary to our Agripro soybean associates, . . . [D]on't inform them that 1985 will be the last year that we will sell registered seed, but wait until spring of 1985 to tell them. Doing so will give us an additional 6 months to get our program implemented and settled . . . It does not change

our strategy any, but it may help us hold more of the associate business without tipping our hand to them ahead of time." Exhibit T-3268, JA 632. NAPB employees were warned to follow all scripts and that "loose lips sink ships." Meanwhile, the Associates continued to share their business plans with NAPB, and NAPB responded that it would treat the information as "confidential." The Associates' first knowledge of NAPB's plan came in July 1984, sixteen months after the scheme was conceived, when NAPB implemented the plan by terminating the Associate program and commencing fierce competition with the Associates.

The sudden termination of the Associates when they had soybeans in the ground, which they would now be selling in competition with NAPB, was devastating. At NAPB's encouragement, Latham's 1984 seed stock order was the largest NAPB had ever received. Associate Sheppard immediately lost dealers representing half of his sales. Associate Shockney had 10,000 bags which he could not sell. Regarding NAPB's competition, Shockney was in a typical predicament: "It left me in an astonishing situation where I had a warehouse full of the competition's seed beans, and I didn't know whether to sell them or what to do with them, because if I sold them, why, I was helping the competition. If I didn't sell them, it would hurt me financially. So it was a no-win situation." Tr. 2491. Prior to terminating the Associates, NAPB raised the seed stock prices paid by the Associates and increased their royalty rates. When NAPB did go into competition with the Associates, it substantially underpriced the Associates on the Agripro soybeans which the Associates had for sale. NAPB developed a new logo and line of packaging for its direct marketing of Agripro soybeans. The Associates were forced to use the old bags.

NAPB used the Associates' confidential information including the type of soybean seed sold, the amount of soybean seed sold, and the geographic area where the soybean seed was sold. NAPB prepared maps of the

Associates' trade areas to aid NAPB's salesmen in aggressively taking the Associates' Agripro soybean seed business.

This is what the jury could find from the record. NAPB pretends that this record does not exist. But this is the record on which compensatory and punitive damages were awarded by an Iowa jury, which the experienced trial judge described as one of the most conscientious he had ever worked with (Pet. App. 27A). This is also the record reflected in the facts recited by the district court in its ruling on post-trial motions (Pet. App. 20A-35A), the district court's recitation of the facts in its order on remand (Pet. App. 36A-51A), and the court of appeals' recitation of the facts in its opinion (Pet. App. 1A-19A). As this Court can see, NAPB has continued to ignore and deny the evidence the jury found to be true.

REASONS FOR DENYING THE WRIT

1. BECAUSE THIS CASE WAS REVIEWED UNDER THE *HASLIP* STANDARDS, NO QUESTION IS PRESENTED REGARDING WHETHER LESSER STANDARDS WOULD COMPLY WITH DUE PROCESS.

This case was reviewed by the district court and the Eighth Circuit under the *Haslip* standards. Petitioner misleads this Court when it claims that the post-verdict review was conducted under only the "shocks the conscience" and the "passion and prejudice" standards. NAPB misdirects the Court by focusing only on the trial court's initial post-trial ruling (Pet. App. 20A-35A)[3] made in 1990, prior to *Haslip*. NAPB does not address the district court's second, meticulous post-*Haslip* review

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[3] This ruling was made Aug. 2, 1990 prior to the approval of due process standards by this Court in *Haslip* which was decided March 4, 1991.

(Pet. App. 36A-51A)[4] of the punitive damage awards made after the Eighth Circuit's remand order in 1991. NAPB even omits from its appendix the Eighth Circuit order (SA 1-3) which remanded this case for the specific purpose of conducting a post-verdict review using the standards approved by this Court in *Haslip*. In typical fashion, NAPB has selected "fragments" of the decisions to support its arguments.[5] For example, NAPB quotes a portion of the court of appeals' decision to suggest that the court of appeals reviewed the punitive damage award solely under the "passion and prejudice" tests afforded by state law. NAPB's quotation (Pet. 13-14) stops mid paragraph and omits the Eighth Circuit's central conclusions:

> Indeed, the district court's additional scrutiny of the award under the seven *Haslip* factors[6] helps to ensure that the jury's verdict satisfied due process requirements. We find the district court's reasoning persuasive, and we affirm its conclusion that the award of punitive damages did not violate constitutional standards.

Pet. App. 17A

No due process question is presented under the record in this case. NAPB received all of the due process protections approved in *Haslip*. NAPB cannot establish any deficiencies in the process followed in awarding and reviewing punitive damages. NAPB is merely engaged in

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[4] This order was filed on September 30, 1991, after *Haslip*, and satisfied the mandate of the order of the court of appeals entered June 21, 1991 to review the punitive damage awards under the standards set forth by the Supreme Court of the United States in *Haslip*. See SA 1-3.

[5] The same practice by NAPB was criticized by the court of appeals. Pet. App. 17A.

[6] The Eighth Circuit Court of Appeals remarked upon the district court's thorough review of the award under the seven factors used by Alabama courts and approved in *Haslip*. Pet. App. 16A.

one last desperate attempt to upset the jury verdict. Due process does not exist to guarantee that litigants will be satisfied with fair, but unfavorable, decisions.

In *Haslip*, this Court approved procedures which imposed a triple constraint on the discretion of the jury through (1) adequate instructions, (2) post-trial review by the trial court, and (3) appropriate review by the appellate court. 111 S.Ct. at 1044-46.

This jury was constrained by proper instructions.[7] NAPB had the benefit of review at the trial court level by William C. Hanson, a seasoned trial judge with over 37 years judicial experience. Judge Hanson subjected the jury's award of punitive damages to the type of searching and exhaustive review which was approved in *Haslip*. In addition, the awards were reviewed to ensure their compliance with the state standards. This scope and intensity of review far exceeded the procedures found to be sufficient in *Haslip*.

The panel of the Eighth Circuit which also upheld the award after scrutiny under the *Haslip* standards included Senior Judge Donald P. Lay, then Chief Judge of the Eighth Circuit, Paul H. Roney, senior judge and former Chief Judge of the Eleventh Circuit, and Roger L. Wollman, circuit judge and former Chief Justice of the Supreme Court of South Dakota. The courts that have reviewed the punitive damage awards have competently, thoroughly and adequately applied the mandates of the Due Process Clause as interpreted by the Court in *Haslip*.

The initial post-trial review of the punitive damage awards was conducted by Senior Judge Hanson. Although the trial was held prior to the *Haslip* decision, the district court applied the Eighth Circuit's decision in *Davis v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 906 F.2d 1206 (8th Cir. 1990), which anticipated the due process constraints that the Supreme Court would adopt in *Haslip*. Pet. App. 33A.

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[7] See discussion of jury instructions, Question 3, *infra* p. 20.

The appeal was submitted to the Eighth Circuit three months after the *Haslip* decision. In order to ensure that NAPB received the full benefit of all the procedures approved in *Haslip*, the Eighth Circuit remanded to the district court for review of the punitive damage awards under the seven objective standards approved in *Haslip*. SA 2-3.

Pursuant to the remand from the Eighth Circuit, the district court performed an exhaustive fact-intensive evaluation of the reasonableness of the punitive damage award consistent with the *Haslip* procedures.[8] After review, the district court found that the awards were reasonable and met the due process standards approved in *Haslip*. The district court was in the best position to make this review, since it had firsthand knowledge of the evidence and was in a position to evaluate the credibility of the witnesses and their evidence and could observe whether the jury was affected by passion or prejudice or was attentive, diligent and conscientious. This second post-trial review subjected the punitive damage awards to careful scrutiny under the *Haslip* standards to ensure that the awards had a reasonable relationship to NAPB's wrongful conduct, the harm done by NAPB, and to the purpose of discouraging similar conduct by others. NAPB's rights to due process were fully protected.

The Eighth Circuit protected NAPB's right to due process by further ordering that the parties file additional briefs setting forth their positions concerning the district court's supplemental findings and conclusions on the punitive damage issues and due process. SA 14. The court of appeals undertook its own rigorous and thorough review of the record and concluded that NAPB's rights to due process had been protected[9].

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[8] The district court placed no limits on the parties' briefs and arguments. SA 12-13.

[9] The Eighth Circuit deliberated for over one year before concluding that the punitive damages awarded against NAPB

NAPB cannot fairly claim that the court of appeals' decision treated *Haslip* as having imposed "no meaningful due process limitations" on the award of punitive damages. The Eighth Circuit plainly accepted and applied the *Haslip* standard even though the court recognized that *Haslip* did not necessarily establish a minimum standard of due process. The district court and the court of appeals thus not only applied the state court standards, but also reviewed and approved the award under the objective criteria approved in *Haslip*. State court standards were applied as an additional safeguard and not as a substitute for the *Haslip* factors. Since both the district court and the court of appeals made the type of independent, searching review of the record that was approved in *Haslip*, certiorari in this case should be denied. No question is presented under this record concerning whether a lesser standard would comport with due process.

2. BECAUSE THE JURY CONSIDERED ONLY EVIDENCE OF WRONGFUL CONDUCT WHICH WAS RELEVANT TO NAPB'S FRAUD AND MALICE, NAPB'S SECOND QUESTION LACKS RECORD SUPPORT AND HAS NO MERIT.

In urging its second question as a basis for certiorari review, NAPB contends the district court and Eighth Circuit should have limited their consideration to NAPB's conduct during a four-month period in 1984, ignoring the broad landscape of NAPB's reprehensible conduct starting a year earlier.[10] In other portions of its Petition, NAPB

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were proper and that NAPB had been afforded all of the due process rights and procedures which this Court had approved in *Haslip*. The decision was unanimous. No Eighth Circuit Judge supported NAPB's Petition for Rehearing with Suggestion for Rehearing *En Banc*.

[10] The district court addressed this argument in its ruling on post-trial motions holding that NAPB's plan to steal the

contends that the record received too little scrutiny. Here, it complains that it received too much.

The district court submitted four claims of fraud to the jury.[11] For any of the claims to be sustained, the Plaintiffs were required to prove all eight fraud elements listed in Instruction No. 38. The ten jurors unanimously found that NAPB had fraudulently concealed its intention to terminate the Associates and to market Agripro brand soybeans in competition with them.[12] The jury found against Plaintiffs on their other three fraud claims, but the record does not disclose what fraud elements on those claims the jury found were not proven. The failure

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Plaintiffs' dealers and to conceal their intentions related to NAPB's actual motivations and concerns. The jury was entitled to consider this evidence in assessing punitive damages. Pet. App. 30A n. 5.

[11] See the special verdict form which sets forth the four fraud claims submitted to the jury. SA 5.

[12] Iowa, Michigan, Ohio and Indiana have all adopted Restatement (Second) of Torts, §551 which imposes liability for nondisclosure in business transactions. Decisions in these states supporting the duty of disclosure to avoid a fraudulent misrepresentation include *Air Host Cedar Rapids, Inc. v Cedar Rapids Airport Commission*, 464 N.W.2d 450, 453 & 454 (Iowa 1990); *Sinnard v. Roach*, 414 N.W.2d 100, 105 (Iowa 1987); *Cornell v. Wunschel*, 408 N.W.2d 369, 374 (Iowa 1987); *Nie v. Galina State Bank & Trust Co.*, 387 N.W.2d 373 (Iowa Ct.App. 1986); *Sedco International, S.A. v. Cory*, 522 F.Supp. 254 (S.D. Iowa 1981), aff'd *Sedco International., S.A. v. Cory*, 683 F.2d 1201 (8th Cir. 1982), *cert. denied*, 459 U.S. 1017, 103 S.Ct. 379, 74 L.Ed.2d 512 (1982); *U. S. Fidelity and Guaranty Co. v. Black*, 313 N.W.2d 77, 88 (Mich. 1981); *Strand v. Librascope, Inc.*, 197 F.Supp. 743, 744 & 754 (E.D. Mich. 1961); *Miles v. McSwegin*, 388 N.E.2d 1367 (Ohio 1979); *Central National Bank of Greencastle v. Shoup*, 501 N.E.2d 1090 (Ind. Ct.App. 1986); *Thompson v. Best*, 478 N.E.2d 79 (Ind. Ct.App. 1985); *Indiana Bank and Trust Co. of Martinsville, Indiana v. Perry*, 467 N.E.2d 428 (Ind. Ct. App. 1984). The development of the common law of fraud in these states is a particularly inappropriate area for this Court's intervention.

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of proof on these claims is far from a finding of "not guilty" as asserted by NAPB. Pet. 19. NAPB's conduct was a seamless whole, and the same evidence was relied on by Plaintiffs to prove all of their claims.

NAPB deceives the Court by claiming that the review of punitive damages was based only on *claims* for which it was found not guilty. The truth is that the evidence examined in the post-trial *Haslip* review was relevant to the fraud of which NAPB was guilty. The jury had been instructed to consider all reasonable inferences that could be drawn from the facts and circumstances in determining whether NAPB intended to deceive the Associates by fraudulently concealing its intention to terminate the Associates and to compete with them.[13] Since evidence of fraudulent intent is seldom direct, all of NAPB's *conduct* was relevant to the *claim* of fraud upon which NAPB was found guilty[14] In deciding whether to award punitive damages the jury was instructed to consider NAPB's *conduct* in determining whether the claim of fraud for which NAPB was guilty was committed with legal malice. The conduct reviewed below was all relevant to the scheme which NAPB fraudulently concealed. The evidence showing why and how this fraud was perpetrated was also plainly relevant in supporting the jury finding that NAPB committed the fraud with legal malice. In contending otherwise, NAPB continues its pattern of denial, refusing to view the evidence in its light most favorable to the verdict as required by the applicable standard of review.

The Eighth Circuit reviewed some of the relevant evidence in holding that NAPB's malicious conduct justified the punitive damages:

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[13] NAPB did not object to that instruction, number 43, nor does it challenge here the jury's finding that this competition was in breach of contract.

[14] Fed. R. Evid. 401, 402.

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> In addition, the record is replete with examples of conduct on Nickerson's part that support the award of punitive damages. For example, Nickerson used various ruses to procure the Associates' dealer lists to facilitate its undisclosed plan to recruit the Associates' dealer customers. Nickerson asked its advertising manager, Chuck Stephens, to covertly check Associate Schettler Seed Farm's dealer list, despite his ethical reservations. Nickerson management suggested that its salesmen obtain the dealer lists by offering to help boost Associate sales through identifying their key dealers. One salesman, Charles Jackson, testified that he lied to obtain access to old advertisements containing dealer names. Another salesman, Russell Welty, expressed reservations about, as he put it, betraying the Associates' trust by getting the dealer names. Welty's refusal to betray that trust was one of the reasons that gave rise to his being terminated by Nickerson. Taking all of this into account, we find no abuse of discretion in the district court's assessment that the punitive damages awards were not improper.

Pet. App. 14A. The district court recounted NAPB's reprehensible conduct in much greater detail in its initial ruling (Pet. App. 28A-30A) and in its review after remand. Pet. App. 43A-46A.

NAPB's ruses to obtain Associate dealer lists were integral to its dishonest scheme to terminate the Associates and then use the dealer lists to compete with them. Pet. App. 43A. Contracting to add Coomer as a new Associate at a time when NAPB was hiding its intention to terminate the Associate system was another relevant component in the deception. Pet. App. 43A. As observed by the district court in its review after remand, "The jury could have concluded that defendant intended to destroy the associates' businesses, to acquire all the associates' Agripro soybean seed sales, and to use the dealers which the associates had established." Pet. App. 44A.

NAPB's nefarious scheme and the fraudulent concealment of its secret plans involved wrongful conduct over a period of more than a year which NAPB's own employees described as a "cover story", a "decision that wasn't morally or ethically right", "stealing", "unethical", "lies", "betrayal of trust", "dishonest", "bastardizing", and "misleading". NAPB's malicious conduct is examined at length by the district court and court of appeals. Pet. App. 14A, 28A-31A, 43A-45A, 49A-51A.

NAPB attempts to rewrite the record in contending that the only tortious conduct it committed was " . . .its delay from March to July 1984 in informing plaintiffs of its decision to change marketing systems." Pet. 18. However, the district court held the jury could find that NAPB commenced its fraudulent conduct in April of 1983. Pet. App. 44A. After the remand, the district court stated:

> This was not a situation where a sudden change in the marketplace forced defendant to change its marketing plans. Defendant commenced a long and exhausting process of planning and analysis to prepare NAPB to acquire the associates' businesses, their dealers, and to compete directly with them.
>
> Concealing its decision prevented plaintiffs from preparing for the change. For this reason, the duration of the fraud was particularly damaging.

Pet. App. 45A.

The jury actually found that for 16 months NAPB " . . . fraudulently concealed its intention to terminate the associates and to market Agripro brand soybeans in competition with them."[15] In this fraud case, *all* of NAPB's wrongful conduct towards the Associates was relevant

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[15] The jury also found that Agripro breached its contract with the Plaintiffs when it "Sold Agripro soybeans in direct competition in breach of contract." and "Failed to disclose all relevant matters in breach of contract." See special verdict form. SA 4-6.

and material to the issues of liability and punitive damages. Due process requires that the jury and the reviewing courts consider the entire record of the Defendant's conduct. *Haslip*, 111 S.Ct. at 1045. NAPB's claim to the contrary is without merit.

3. BECAUSE THE INSTRUCTIONS LIMITED THE JURY TO CONSIDERATION OF THE FINANCIAL CONDITION OF NAPB IN AWARDING PUNITIVE DAMAGES, NAPB'S QUESTION ALLEGING THE INSTRUCTIONS ALLOWED THE WEALTH OF THIRD PARTIES TO BE CONSIDERED IS UNFOUNDED.

NAPB's due process rights were protected by the district court's jury instructions which mirror the instructions approved in *Haslip*. NAPB denies the plain meaning of Instruction No. 54 when it contends that the instruction allowed the jury to assess punitive damages based upon the wealth of Royal Dutch/Shell, a remote parent company of NAPB. The court instructed the jury to consider *only* the financial condition of NAPB and *not* to consider the condition of any other company. SA 11. There is absolutely no record support for NAPB's assertion that the jury considered the financial condition of any of NAPB's parent companies. This claim is a total fabrication.

Instruction No. 54 contained all of the restraints upon the jury's discretion[16] which this Court found sufficient in *Haslip*. As a further protection, Instruction No. 54 limited the jury's discretion in awarding punitive damages to:

> The amount of punitive damages which will punish and discourage like conduct by the opposing party in view of its financial condition (in considering this criteria you may only consider the financial condition of defendant NAPB

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[16] See the entire instruction on punitive damages. SA 9-12.

> and not the condition of any other company you have heard mentioned in the trial).

SA 11.

The district court's Instruction No. 54 was proper in light of the *Haslip* decision and sufficiently restrained the jury's discretion in the award of punitive damages. The instruction was more extensive and restrictive than the instruction approved in *Haslip*. The court of appeals carefully examined the punitive damages instruction and the laws of Iowa, Ohio, Indiana and Michigan, and found that: " . . . the instruction adequately explained the law and that the jury properly followed the instruction." Pet. App. 11A.

Another example of NAPB's pattern of misstating the facts by combining unrelated incidents is its claim that Plaintiffs "urged the jury to assess punitive damage based upon the wealth of Royal Dutch/Shell, NAPB's remote parent company." NAPB asserts that Plaintiffs argued that:

> ' . . . you people have a pretty good handle from the testimony . . . what kind of multi-national companies we deal with in this case, and you can make the [punitive damages] decision on that.' (Argument Tr. 232) and that in assessing punitive damages the jury should consider 'how deep is Shell's pocket?' (Argument Tr. 71)

Pet. 7

The comment in closing arguments concerning NAPB being a "type of multi-national company"[17] meant literally that. NAPB was a multi-national company. During most of its history, it was a partnership consisting of Nickerson Seed Company of England and Olin Corporation of the United States. Many of NAPB's officers and

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[17] It should be noted that this comment which NAPB complains of appears 161 pages later in the transcript than the first comment NAPB complains of. The only relationship between the two comments is they occurred on the same day, albeit 7 hours apart.

directors were citizens of another nation. NAPB called witnesses from England and Switzerland to testify about its business practices.[18]

Plaintiffs never argued that the jury should assess punitive damages based upon the wealth of Royal Dutch/Shell. Instruction No. 54 prohibited any consideration of the financial condition of any other company mentioned in the trial. NAPB's claim to the contrary is groundless.

The reference to Shell's pocket is a quote from NAPB's own document (Exhibit 1068, JA 582), which went into evidence without objection. These handwritten notes of an NAPB official were made during a secret meeting on January 19, 1984, during which NAPB officials discussed the risks of being sued and the size of the dollar risk. NAPB's officer's note, "How deep is Shell's pocket?" reflected his analysis of that risk. This phrase was coined by NAPB's own officers and reflected NAPB's realization that its fraudulent conduct exposed it to an enormous financial risk if there was litigation.

Plaintiffs used Exhibit 1068 in closing argument to show the deliberate nature of the fraud and the fact that NAPB's officers had contemplated the enormity of the dollar risk from their fraudulent conduct. NAPB considered litigation to be a cost of its fraudulent scheme and it had decided that the financial cost of getting caught was

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[18] The district court in responding to a similar complaint made in NAPB's post trial motions stated:

> Defendant's relationship with Shell Oil Company (Shell) was brought to the attention of the jury by both parties. Several relevant documents referred to Shell and defendant chose to have persons associated with Shell act as some of its key witnesses. The court did instruct the jury that in setting any punitive damages award it could only consider the financial resources of defendant, and not of any other companies mentioned during the trial.

Pet. App. 31A n. 7.

a risk it could afford. The final arguments urged the jury to punish NAPB for its conduct. No one requested, nor did the district court allow the jury to punish NAPB based on the wealth of Shell Oil Company.

NAPB falsely claims that the jury had *no evidence* of NAPB's financial condition. The district court's analysis of this *Haslip* factor found:

> NAPB planned to increase its margin on Agripro soybeans from $.95 royalty fee to $2.75 per unit by implementing this plan. At the March 1984 sales level of one million bags of Agripro, this amounted to $1.8 million per year of additional profit, or $10 million[19] in five and a half years.

Pet. App. 46A-47A.

> . . . [O]ther evidence of the financial condition of defendant introduced at trial shows the award is not excessive. This includes defendant planned to increase its Agripro profit margin by $1.80 per unit, defendant's projected 1985 revenues were $78.9 million, and 1990 revenues were $164.9 million.
>
> Finally, there is no doubt that the evidence clearly shows that almost from the date of purchase defendant represented itself as fully able and willing to support any financing necessary and incidental to producing a superior soybean seed.

Pet. App. 47A-48A.

Moreover, the district court found that other evidence of NAPB's financial condition in the record would allow the jury to believe the Defendant had a net worth far in excess of the punitive damage assessed. The district court noted:

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[19] The Court of Appeals noted that, "There is testimony in the record that Nickerson realized approximately $10 million from discontinuing the associate program." Pet.App. 14A. This evidence came from NAPB's own document (Exhibit 234, JA 502-5), not the oral testimony.

> Further, attempts by plaintiff to show defendant's condition was resisted at every step in the proceedings. *The plaintiff has made a prima facie case regarding the financial condition of the defendant, and there has been a minimum of evidence by defendant to disprove the premise.* If this defendant sought to prove poverty, it should have moved forward. It chose not to do so. [Emphasis added]

Pet. App. 48A n 3.

The court of appeals observed that Defendant was aware that punitive damages would be submitted and had the opportunity to introduce its net worth statement into evidence if it was concerned that its relationship with the Royal Dutch/Shell organization would lead the jury to conclude its resources were greater than they were. The court of appeals found NAPB's arguments to be without merit. Pet. App. 12A. None of the states involved require evidence of Defendant's net worth as a condition to the award of punitive damages. The simple fact is that there was substantial evidence of NAPB's financial condition in the record. The only thing not in the record was NAPB's purported statement of net worth, something which not even NAPB was prepared to offer into evidence.[20] Had NAPB sought to inform the jury of its alleged net worth, it would have been required to prove that its net worth statement was accurate. NAPB's claim that its net worth is only $48 million *is nothing more than a claim.* It is not a part of the trial record, its accuracy

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[20] Prior to trial, NAPB had exchanged its assets for shares in another company. During trial, NAPB existed only as an empty corporate shell with no business operations or activities. Plaintiffs did not believe that NAPB's net worth statement was accurate, nor did they have any independent means of verifying NAPB's net worth.

has never been tested or established, and the claim should not be considered by this Court[21].

NAPB did not preserve the issue that it would be prejudiced if it were required to offer evidence of its net worth, as that might be viewed by the jury as a concession of liability.[22] Had these concerns been raised at the district court level, prejudice could have been avoided by an appropriate instruction, by bifurcating the issues of the right to recover punitive damages from the amount of the recovery[23], by requesting a stipulation, or by other means.

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[21] *Haslip* was decided with reference to Alabama law which precluded introduction before the jury of evidence of financial condition, while permitting the trial court and the appellate court to go beyond the record and consider such evidence in the appeal. None of the applicable states in this case would permit the consideration of evidence which was not presented to the jury.

[22] NAPB's reliance upon *Adams v. Murakami*, 284 Cal.Rptr. 318, 813 P.2d 1348 (Cal. 1991) is misplaced for two reasons - (1) the California Supreme Court based its decision upon an expression of California public policy, not on constitutional grounds, "We need not decide, and do not decide, whether evidence of a defendant's financial condition is a *constitutional* prerequisite under *Haslip* . . . " Id. p. 1356; and (2) none of these states require the Plaintiffs to put Defendant's net worth into evidence as a condition to the recovery of punitive damages. *Hibschman Pontiac, Inc. v. Batchelor*, 362 N.E.2d 845, 849 (Ind. 1977); *Peisner v. Detroit Free Press*, 242 N.W.2d 775, 780 (Mich. Ct.App. 1976); *Hall v. Montgomery Ward & Co.*, 252 N.W.2d 421 (Iowa 1977); *Wagner v. McDaniels*, 459 N.E.2d 561 (Ohio 1984); *Arlington State Bank v. Colvin*, 545 N.E.2d 572, 581 (Ind. Ct.App. 1989). The trial court distinguished *Adams*. Pet. App. 48A n. 3.

[23] Before trial, Judge Hanson had raised the possibility of bifurcation of liability from damages and discussed the question of bifurcation often during trial (Tr. 612, 700, 1487-88, 3794). Defendant did not want bifurcation (Tr. 1487). Bifurcation is one of the protections which Justice O'Connor recommended in *Haslip*, 111 S.Ct. at 1064.

NAPB's third question does not present any issue appropriate for a grant of certiorari.

4. BECAUSE THE PUNITIVE DAMAGE AWARDS WERE PROPORTIONAL TO THE WRONGFUL CONDUCT AND RESULTING HARM, NO DUE PROCESS ISSUE IS RAISED BY THE SIZE OF THE PUNITIVE DAMAGE AWARDS, AND THE FOURTH QUESTION HAS NO MERIT.

The jury's award of punitive damages is proportional to the injury inflicted and has a reasonable relationship to the compensatory damages awarded under the standard approved in *Haslip* and faithfully followed by the district court and the court of appeals.

In *Haslip*, Cleopatra Haslip had out-of-pocket losses of less than $4,000 which were included in a request for compensatory damages of $200,000. The *Haslip* jury returned a general verdict for her in the amount of $1,400,000 which did not differentiate between punitive damages and economic or non-economic compensatory damages. Depending on one's speculation as to the amount of compensatory damages, the ratio of punitive damages to compensatory damages in that case is anywhere between 4.2 to 1 to 259 to 1.[24] In contrast, the ratio of punitive damages to *purely economic damages* in this case is 9 to 1.

Ratios of punitive damages to actual damages are not controlling in determining whether a punitive damage award is excessive, especially when only purely economic damages are involved. These Plaintiffs were limited to

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[24] "We are aware that the punitive damages award in this case is more than 4 times the amount of compensatory damages, is more than 200 times the out-of-pocket expenses of respondent Haslip. . . . We conclude, after careful consideration, that in this case it does not cross the line into the area of constitutional impropriety." *Haslip*, 111 S.Ct. at 1046.

the recovery of out-of-pocket losses which the jury calculated to the penny.[25] Substantive due process cannot be judged solely by ratios of punitive damages to actual damages because "[a]n inflexible mathematical ratio which focuses on the plaintiff's injuries rather than the wrongful acts of the defendant fails to accomplish the policy objectives of punishment and deterence . . . " *Ryan v. Arneson*, 422 N.W.2d 491, 496 (Iowa 1988); " . . . [L]egal precedent is of limited value in evaluating the amount of punitive damage awards in individual cases." *Johnston v. Norfolk Southern Corp.*, 448 N.W.2d 486, 489 (Iowa 1989).[26] This Court approved the Alabama system of post-verdict review in *Haslip* because it "ensures that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." 111 S.Ct. at 1045. The same standards were met here.

This case is truly unique because all claims for actual and punitive damages which could ever be assessed against NAPB due to its fraudulent conduct were submitted to a single jury. Once that jury determined that $10 million was the appropriate amount to punish NAPB, the allocation of the damages among the Plaintiffs could not be prejudicial to NAPB. The fraudulent conduct was the

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[25] Compare these verdicts to cases where the damages are for non-economic loss such as pain and suffering, disfigurement, mental anguish, damage to reputation etc.

[26] The Eighth Circuit has also stated that legal precedent is of limited value in determining whether an award is excessive. The Court stated: "such comparisons are not greatly helpful because each case must be evaluated as an individual one, within the framework of its distinctive facts". *Vanskike v. Union Pacific R. Co.*, 725 F.2d 1146, 1150 (8th Cir. 1984). This Court has wisely adopted the rule that defendants can best be protected against excessive punitive damages through procedures that protect due process under *Haslip* rather than by a bright line test which achieves simplicity at the expense of individualized assessment of punitive damages.

same to all of the Plaintiffs and was equally directed towards stealing their dealers and destroying their businesses. Thus, an equal division among the Plaintiffs is proportionate to the wrongful conduct and the harm intended. The only parties who could claim to be prejudiced by the jury's division of the punitive damage award are the Plaintiffs themselves. The court of appeals observed that

> . . . each plaintiff suffered from the same fraudulent conduct on Nickerson's part. The actual damages varied only because of the size of the associate. There is testimony in the record that Nickerson realized approximately $10 million from discontinuing the associate program.

Pet. App. 14A. Because NAPB's wrongful conduct toward each Associate was exactly the same and the intended harm, stealing their dealers and destroying their businesses, was the same for each Associate, equal punitive damages were proportional and reasonably related to injury. Although the smaller Associates may have proven smaller losses, NAPB's scheme caused them much greater relative harm since they were less able to withstand cutthroat competition from their former "partner," NAPB.

The measure of compensatory damages available to these Plaintiffs was the same for breach of contract and fraud[27]. NAPB's assertion that the jury awarded the damages for breach of contract rather than for fraud has no basis in the record. Upon review of the verdict, the courts must presume that all of the undifferentiated damage award was for fraud. In a fraud case, the award of economic damages imposes no real punishment whatsoever.[28] A verdict for fraud damages merely returns to the Plaintiffs the losses which are proven to be the direct

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[27] Instruction No. 48 permitted the jury to award damages equal to the benefit of Plaintiffs' bargain had no contract breach or no fraud occurred. Instruction Nos. 47 and 48, SA 7-9.

[28] *Walker v. Sheldon*, 223 N.Y.S. 488, 492, 179 N.E.2d 497, 499 (N.Y. 1961)

result of the fraud. Such damages do not fully compensate the Plaintiffs, nor do they extract from the Defendant all of the fruits of its fraudulent scheme.

The district court and the court of appeals found that there was evidence which would place NAPB's potential profit from the fraud at $10 million. NAPB's fraudulent conduct was directed at all 35 Associates, yet only 13 sued and 10 went to trial[29]. The statute of limitations barred any other claims; hence, NAPB was exposed to verdicts for damages for only 10 of its 35 victims. Substantial punitive damages were required to extract the Defendant's profit and to cause NAPB to suffer a loss.

The exemplary damages award to St. Joseph Valley Seed Company was appropriate. Under Michigan law, exemplary damages may be awarded as compensation for loss where the damage inflicted upon the plaintiff was not susceptible to precise and definite measurement. Under Michigan law, lost profits are inherently incapable of precise measurement, as is damage for injury to reputation.[30] The district court's jury Instruction No. 54 clearly defines the purposes for exemplary damages under Michigan law. In reporting its verdict, the jury foreman specifically stated that Michigan law had been followed in making MFI's award. Pet. App. 32A n. 8. The purely economic damages awarded MFI are considerably less than the amount which the evidence would support. Exhibit 1339. There was evidence that MFI's business reputation was damaged. Tr. 3166, 3190, 3313-3315.

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[29] Obviously, none of the non-suing associates recovered any of their losses from NAPB. Substantial punitive damages were required to deny NAPB the benefit of this fraudulent gain.

[30] *Joba Construction Co. v. Burns & Roe, Inc.*, 329 N.W.2d 760 (Mich. Ct.App. 1982); *Hays-Albion v. Kuberski*, 311 N.W.2d 122 (Mich. Ct.App. 1981)

The jury followed Michigan law and the court's instructions[31] in awarding exemplary damages once fraud and malice were shown. The question of whether to award such damages and their amount were issues of fact for the jury to determine under the instructions.

Because the punitive damages were proportional to NAPB's wrongful conduct and the resulting harm, there is no basis for certiorari review on NAPB's fourth question.

CONCLUSION

The Petition for Certiorari is without merit. It rests on egregious distortions of the record and procedures below. The procedures recently approved in *Haslip* were strictly followed in this case. These punitive damage awards are consistent with procedural and substantive due process. Certiorari should be denied. That denial should not be delayed until the decision in *TXO*. No purpose would be served either by delay or by sending this case back to the Eighth Circuit.

Respectfully submitted,

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March 15, 1993

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[31] The court of appeals commented favorably upon the comprehensive instruction on Michigan's standards for exemplary damages. Pet. App. 16A n. 6.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 90-2486

Latham Seed Company; The Ohio Grain Company, f/d/b/a Ohio Soil Service, Inc.; Schettler Seed Farm, Inc., d/b/a Diamond Brand Seeds; Rupp Seeds, Inc.; Shockney Seed Service, Inc.; Diener Bros., Inc.; Charles O. Laverty, d/b/a Laverty Seed Farm; Coomer Seeds, Inc.; Settlemyre Seed Company; St. Joseph Valley Seed Co., d/b/a M.F.I. Seeds, Appellees,	*	Appeals from the United States District Court for the Northern District of Iowa.
v.		
Nickerson American Plant Breeders, Inc., d/b/a Agripro Seeds, Appellant.		

No. 90-2550

Latham Seed Company; The Ohio Grain Company, f/d/b/a Ohio Soil Service, Inc.; Schettler Seed Farm, Inc., d/b/a Diamond Brand Seeds; Rupp Seeds, Inc.; Shockney Seed Service, Inc.; Diener Bros., Inc.; Charles O. Laverty, d/b/a Laverty Seed Farm; Coomer Seeds, Inc.; Settlemyre Seed Company; St. Joseph Valley Seed Co., d/b/a M.F.I. Seeds, Appellants,	*	
v.		
Nickerson American Plant Breeders, Inc., d/b/a Agripro Seeds, Appellee.		

ORDER

Filed: June 21, 1991

Before LAY, Chief Judge, RONEY*, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

Without prejudice to either party as to this court's review on the merits relating to the liability issues, the court at this time remands this case to the district court to review the awards of punitive damages under the standards recently set forth by the Supreme Court of the United States. In *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S.Ct. 1032, 1045 (1991), the Supreme Court held that a court reviewing a jury's award of punitive damages may "ensure[] that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages" by considering certain objective standards including:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of

* The HONORABLE PAUL H. RONEY, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

> similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

The Court also indicated that a jury must not assess punitive damages solely on the basis of the defendant's net worth. *Id.* We conclude that the district court in the present case should consider whether, under applicable state law, the punitive damages are reasonable in light of the standards set forth in *Haslip*. *See Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991).

The district court should entertain briefs from the respective parties and, within a reasonable time, certify its findings back to this court. This court will hold final opinion on the merits until such time we receive the district court's certification.

A true copy.

Attest: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

LATHAM SEED COMPANY, Plaintiff, vs. NICKERSON AMERICAN PLANT BREEDERS, INC., d/b/a Agripro Seeds, Defendant.	)	CASE NO. C85-3114 SPECIAL VERDICT (Filed May 25, 1990)

We the jury, unanimously return the following answers:

PART I – BREACH OF CONTRACT

1. Do you find that plaintiff has proved any of its claims of breach of contract?

   ANSWER: "Yes" or "No" yes

If the answer is "yes," go on to question No. 1-a. If the answer is "no," go on to PART II.

1-a. Mark the blank next to each claim of breach of contract which plaintiff has proven defendant committed.

no A. Failed to provide best varieties in breach of contract.

yes B. Sold Agripro soybeans in direct competition in breach of contract.

yes C. Failed to disclose all relevant matters in breach of contract.

– D. Terminated plaintiff's contract in breach of an agreement that the contract was, or would be, renewed for an additional term beyond 1985.

PART II – FRAUDULENT MISREPRESENTATION

2. Do you find that plaintiff has proved any of its claims of fraudulent misrepresentation?

ANSWER: "Yes" or "No" yes

If the answer is "yes," go on to question No. 2-a. If the answer is "no," go on to PART III.

2-a. Mark the blank next to each claim of fraud which plaintiff has proven defendant committed.

no A. Fraudulently misrepresented that best varieties were, and would continue to be, marketed only through the associates.

no B. Fraudulently misrepresented that a plaintiff could not be terminated except for cause or by mutual consent, and that platintiff's [sic] marketing agreement would be automatically and continually renewed.

yes C. Fraudulently concealed its intention to terminate the associates and to market Agripro brand soybeans in competition with them.

– D. Fraudulently concealed its use of confidential information from the associates to prepare for direct sales in competition with the associates.

PART III – DAMAGES

Complete this part only if you have answered "yes" to *either* question No. 1 in Part I or question No. 2 in Part II. If your answers to both of these questions were "no," do not answer this Part but proceed to answer Part V.

"We, the Jury, fix the amount of plaintiff's compensatory damages in the amount of $475,776.00."

PART IV – PUNITIVE DAMAGES

Complete this part only if you have answered "yes" to question 2 in PART II. If your answer to question 2 in PART II was "no," do not answer this question, but proceed to Part V.

3. Do you find that plaintiff is entitled to punitive damages in this case?

   ANSWER: "Yes" or "No" yes

   If your answer is "yes" complete the following question.

"We, the Jury, fix the amount of plaintiff's punitive damages in the amount of $1,000,000.00." One million dollars

PART V – NAPB'S COUNTERCLAIM

4. Do you find that NAPB has proved its counterclaim against plaintiff?

   ANSWER: "Yes" or "No" no

   If your answer is "yes" complete the following question.

"WE, the Jury, fix the amount of NAPB's recovery on its counterclaim in the amount of $0.00."

/s/ Brian K. Knudtson
FOREPERSON

5/25/90
DATE

INSTRUCTION NO. 47

The remedy, or measure of damages, for breach of contract is known as "benefit of the bargain." In other words, the injured party is entitled to the amount of damages that will place it in the position it would have been in if the contract had been fully performed. Similarly, the remedy, or measure of damages, for fraud is "benefit of the bargain." If you determine, through application of prior instructions, that a party made a fraudulent misrepresentation to another party, causing injury, the injured party is entitled to what it would have received if the representation had been fulfilled.

Thus, should you find that any party has established one or more claims of breach of contract or of fraudulent misrepresentation, it will be your duty to determine the amount of money necessary to put the party in such place as it would have been if the contract had been fully performed and if any such fraudulent misrepresentation, or misrepresentations, had been fulfilled.

Although the basic measure of damages is the same in this case for both theories of recovery, there are some significant differences between damages awardable for breach of contract and damages awardable for fraudulent misrepresentation. Those differences, and further instruction on how to calculate "benefit of the bargain damages," are laid out in the following instructions. If an instruction does not limit itself to a specific form of damages, or to damages for just one of the two theories of recovery, you shall consider it with regard to all damage claims.

Benefit of the bargain damages are compensatory in nature.

INSTRUCTION NO. 48

In the present case, plaintiffs seek the following compensatory damages as part of their benefit of the bargain:

A. Damages equal to the amount of lost profits that plaintiffs claim they lost as a result of defendant not providing them with the best varieties it was producing.

B. Damages equal to the amount of lost profits that plaintiffs claim they lost as a result of defendant's going into direct competition with them.

C. Damages equal to the amount of lost profits that plaintiffs claim they lost as a result of defendant's termination of their contracts.

In the present case, defendant seeks the following compensatory damages as part of its benefit of the bargain:

A. Damages equal to the royalties plaintiffs never paid for their sales of soybeans in the 1984-85 and the 1985-86 sales year.

As already indicated, a party is only entitled to recover damages to the extent that such damages would have been part of its bargain if no contract breach or fraud had occurred. For example, a plaintiff can only recover damages for lost profits related to "best varieties" if it establishes: (1) that defendant either contractually

agreed or fraudulently misrepresented that it would provide plaintiff with its "best varieties"; and (2) that defendant failed to fulfill any such promise. Should you find such an award appropriate, you will then need to determine the period of time for which such plaintiff bargained for the benefit of such varieties.

INSTRUCTION NO. 54

In addition to compensatory damages, each plaintiff also seeks to recover what is known in the law as exemplary or punitive damages. The law permits, but does not require, a jury to allow exemplary damages in proper and specified instances. Thus, if you find, in accordance with this instruction and the evidence, that all the prerequisites for an award of exemplary damages are present, the decision on whether or not to award punitive damages will be exclusively within your province.

Although the law on exemplary damages is not the same for all plaintiffs, each plaintiff does have to establish each of the following before it can be awarded punitive damages:

1. That the plaintiff is entitled to a verdict for actual or compensatory damages. The award of only a nominal sum for compensatory damages should not, however, prevent you from awarding punitive damages if you find that an award of such damages is justified under these instructions;

2. That the act or omission of the defendant which proximately caused the actual injury

or damage to the plaintiff was reckless, wanton or malicious. The malice required to justify the award of punitive damages may be satisfied by either "actual malice" or "legal malice." Actual malice means spite, hatred, or ill-will. Legal malice means wrongful and illegal conduct committed or continued with a willful or reckless disregard of another's rights. It has been defined as the intentional of a wrongful act without just cause or excuse.

3. That the defendant committed fraud. Punitive damages may not be awarded for breach of contract without fraud.

Because of differences in state law the standard of proof for establishing these propositions is not the same for all of the plaintiffs. The standard of proof for Latham Seed Company, Schettler Seed Farm, Inc., Shockney Seed Service, Inc., Diener Brothers, Inc., Charles O. Laverty and Coomer Seeds. Inc., is by a preponderance of clear, convincing and satisfactory evidence as that standard was previously explained to you. The burden of proof with regard to the other plaintiffs is the ordinary "preponderance of the evidence" standard.

There is one other difference in the law applicable to the various plaintiffs which you must keep in mind. Punitive or exemplary damages are generally not compensatory in the ordinary sense, but are instead allowed by way of punishment against a party who has acted maliciously in order to restrain and deter the party, and others, from committing similar acts in the future. In this case, this is the law with regard to nine of the plaintiffs.

Such is not the law, however, with regard to St. Joseph Valley Seed Co., d/b/a M.F.I. Seeds. With regard to this plaintiff, exemplary damages are not to be awarded as punishment of defendant. Instead, you may award such damages only to compensate for injuries not capable of precise computation which are a result of malicious conduct by the defendant and have not otherwise been compensated for. An example of such an injury, in an appropriate case, would be damage to business reputation. If you find that, in addition to the criteria listed above, St. Joseph Valley Seed Co. has shown that such damages are necessary to fully compensate it for injuries it suffered as a result of malicious conduct by defendant, you may award such exemplary damages as you find necessary to reasonably, fairly and adequately compensate plaintiff for injuries caused by such conduct which it has not otherwise been compensated for.

In determining the amount of exemplary damages, if any, which you find should be awarded to the other plaintiffs, you may consider evidence of:

1. The opposing party's conduct;

2. The amount of punitive damages which will punish and discourage like conduct by the opposing party in view of its financial condition (in considering this criteria you may only consider the financial condition of defendant NAPB and not the condition of any other company you have heard mentioned in the trial); and

3. The party's actual damages.

In determining any award of punitive damages, with regard to all plaintiffs, you should bear in mind not only

the conditions under which, and the purposes for which, the law permits an award of punitive damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded must be fixed with calm discretion and sound reason and must never be either awarded or affixed in amount because of any sympathy, bias or prejudice with respect to any party to the case.

Finally, you are instructed that evidence of malice is rarely direct. Therefore you should consider all of the circumstances of this case as disclosed by the evidence in determining whether or not to award punitive damages to any of the parties.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA CENTRAL DIVISION

LATHAM SEED COMPANY, et al., Plaintiffs, vs. NICKERSON AMERICAN PLANT BREEDERS, INC., d/b/a Agripro Seeds, Defendant.	CIVIL NO. C85-3114 ORDER (Filed July 10, 1991)

This matter is before the Court on limited remand by the Eighth Circuit Court of Appeals to consider the constitutionality of the award of punitive damages in this

case under *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S.Ct. 1032, 1045 (1991).

The parties shall address this issue in simultaneous briefs to be filed with the Court on July 29th 1991. The Court will entertain oral arguments on the issue on August 6th, 1991 at 10:00 o'clock at the U.S. Courthouse in **DES MOINES, IOWA.**

IT IS SO ORDERED.

Dated this 5th day of July, 1991.

/s/ William C. Hanson
WILLIAM C. HANSON,
Judge
U.S. DISTRICT COURT

Copies mailed on JUL 10 1991
to counsel of record or pro se
parties as shown on the docket
sheet.
/s/ M. Jebb
Deputy Clerk

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 90-2486/2550NI

Latham Seed Co., et al. Appellants,	*	Appeal from the United States District Court for the Northern District of Iowa
vs.	*	
Nickerson American Plant Breeders, Inc., etc., Appellee.	*	

The court has requested that the parties file simultaneous briefs within fifteen days not to exceed fifteen (15) pages in length setting forth their respective positions concerning the district court's supplemental findings and conclusions on the punitive damages issue as set forth in its order of September 27, 1991. Your prompt cooperation with the court's request would be appreciated.

October 15, 1991

Order entered at the direction of the Court.

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.